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IN THE

Supreme Court of the United States

October Term, 1960

No. 333

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

AGAINST

JOHN R. McWEENEY,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

The grounds urged for the granting of this writ relate solely to the refusal of the trial judge to charge two requests of the petitioner. These requests read as follows:

"17. If you arrive at a verdict under the Court's charge in favor of plaintiff, you will not add any sum of money to the amount of the verdict on account of federal or state income taxes, since the amount awarded to the plaintiff by your verdict is not taxable income to the plaintiff within the meaning of these tax laws."

"18. If your verdict is in favor of plaintiff, you must calculate any past or future loss of earnings on the basis of his net income after deduction of income taxes."

(180, 184; Appellant's requests, pp. 4, 5.)*

The Circuit Court of Appeals considered the case *en banc*. The majority opinion was written by Judge Friendly. In his opinion he states:

> "We were unanimous in finding no error in the refusal to give the five charges requested with respect to defendant's negligence and the three sought in regard to plaintiff's contributory negligence" (Petitioner's brief, pp. A3, A4).

These requests are numbers 1, 2, 6, 7 and 8 regarding negligence and numbers 10, 11 and 12 regarding contributory negligence (180-183, Appellant's Requests, pp. 1, 2, 3).

Judge Friendly held that the refusal to charge requests 17 and 18 was not error. Judges Clark and Waterman agree with him as to both requests. Judge Moore agrees as to request number 18. Judge Lumbard held that it was error to refuse to charge request 17, and Judge Moore agrees with him as to request 17 (Petitioner's brief, pp. A2-23). As to request 18, Judge Lumbard held that on the state of the record the trial judge properly refused the request (Petitioner's brief, p. A17).

* Unless otherwise specified, page references are to Appellant's Appendix.

The Questions Presented

The only question presented in this petition is simply whether Judge Weinfeld was correct in refusing to charge in the language of requests number 17 and 18 and, therefore, under all the circumstances of this case, whether a writ should be granted.

The Case History

Plaintiff (respondent herein), a yard brakeman employed by the railroad company (petitioner), was injured on March 23, 1956, at the Bell Dock Yard of the railroad in New Haven, Connecticut.

On September 20, 1956, a complaint was filed alleging negligence under the Federal Employers' Liability Act (45 U.S.C.A., §51-60). An answer was served and note of issue filed. The case was not reached for trial until February 17, 1959. On that date trial was begun before Judge Edward Weinfeld and a jury, and continued on February 18, 19, 20, 24 and 25, when the jury returned a verdict for the plaintiff for $87,000. Judgment was entered on that date and costs were taxed on March 4, 1959, for $38.

The defendant (petitioner herein) filed a notice of appeal on March 24, 1959. Defendant's time to file the record and brief on appeal was extended from time to time and these papers were not filed until September 14, 1959. Argument was had before the Circuit Court of Appeals on January 8, 1960, and its decision was filed July 29, 1960.

At the close of plaintiff's case defendant moved to dismiss the complaint on the ground that plaintiff had failed to prove any negligence and on the ground that the evi-

dence showed that the plaintiff's negligence was the sole producing cause of his injuries (50). At the close of the evidence defendant renewed said motions and moved for a directed verdict for the defendant (156-157). All of these motions were denied (157). When the verdict was rendered by the jury, defendant renewed its prior motions and moved to set aside the verdict for the plaintiff and for the direction of a verdict in favor of the defendant on the grounds previously stated (185-186). A motion was also made for a new trial because of errors that may have been committed in respect to admission of evidence or ruling of the Court or the Court's charge or failure to charge (189). All these motions were denied (189). As shown in Appellant's Appendix no evidence was admitted over defendant's objection and no exceptions were taken to the Court's main charge. No motion was made to set aside the verdict on the ground that it was contrary to the evidence, or against the weight of the evidence, *or that it was excessive* (Italics ours).

Since no motion was made to set aside the verdict as excessive, it must be assumed, therefore, that defendant's counsel did not then believe it excessive. In Appellant's Appendix no testimony as to plaintiff's injuries, medical care or present condition was included and not any of the medical testimony was included. Plaintiff's Appendix does in detail as to the nature and extent of the injuries and medical evidence submitted by both sides (168-174).

From the opinions of both Judges Friendly and Judge Lumbard it appears that all the judges believed that McWeeney was about 32 years old at the time of the accident. At the trial McWeeney's counsel on direct examination did not ask whether McWeeney was married and had any children. On cross-examination and on redirect examination it appeared that McWeeney had a wife living and also had a father-in-law, both of whom had been previously mar-

[illegible] Court Reporter's Minutes, pp. 30, lns. 114, 116, 122). Although the record does not show it, as a matter of fact, McWeeney has three or four children.

Judge Friendly in his opinion clearly described the confusion which would arise from giving the requested charges concerning income tax. As a matter of fact, no attempt to introduce evidence as to plaintiff's dependents was made because of the rule that the marital status and number, ages and pecuniary needs of his children, had no part in the assessing of damages in this case.

Petitioner's Claim

Petitioner's sole reason for granting of the writ, as set forth in italics on page 4 of his brief, is

> "This case presents an important question of Federal law which has not been, but should be, decided by this Court."

Supplemental Brief, p. 1; and Supplemental Brief, p. 2, claim solely that the refusal to charge Request 17 must be considered an unconstitutional denial of appellant's rights. The Court of Appeals pointed to [illegible] as "very large" and in the petition for the writ [illegible] to the verdict as "high". As we have pointed out, [illegible] that the verdict was excessive.

Whether a writ should be granted not only [illegible] whether Request 17 and the [illegible] but also whether the refusal of such requests presented the defendant

Reasons for Denial of a Writ

Although this Court may never have passed upon the validity and applicability of requests similar to numbers 17 and 18, the question has been considered by various Federal Courts.

In *Stokes* v. *U. S.*, 144 F2d 82, 87 (CCA2, 1944), the Court said:

> "We see no error in the refusal to make a deduction for income taxes in the estimate of libellant's expected earnings; such deductions are too conjectural."

In *Anderson* v. *United Airlines, Inc.*, 183 F. Supp. 97 (S.D. Cal. C.D., 1960), the Court said:

> "The great majority of the reported cases on this subject have arisen as the result of the refusal of the trial court to give such instruction. It is generally held that the trial court acting within its discretion may decline to give it."

In *N. Y. Central R. Co.* v. *Delach*, 252 F2d 522, 527 (CA 6, 1958), the Court said:

> "It was not error for the District Court to refuse the charge requested by appellant to the effect that the Federal Income Tax Law exempts from taxation an award made in a suit for wrongful death and refusing request to charge 'If you should find in favor of the plaintiff, I warn you not to consider income tax liability in your award.'"

In *Combs* v. *Chicago, St. Paul, M. & O. Ry. Co.*, [illegible] F. Supp. 750, 751 (N.D. Iowa W.D., 1961), the Court said:

"The defendant filed a motion for a new trial setting forth a number of grounds. One of the grounds is the refusal of the Court to give an instruction requested by it. The defendant made proper and timely request that the jury be instructed that any allowance of damages to the plaintiff would not be subject to income taxes. Iowa has a state income tax and it was the intent of the defendant that the instruction cover both state and federal income taxes. The request was refused."

* * * * *

"There is not involved in the present case the question as to whether in making an award for future impairment of earning capacity of a plaintiff there should be taken into consideration the taxes that would have been imposed upon his earnings if he had been able to continue his occupation or vocation. The Courts seem well agreed that the future tax liability is subject to too many variables to be a matter of consideration in an award for future impairment of earning capacity. See annotation to Billingham v. Hughes, English Court of Appeal (1949); L.R. 843; 9 A.L.R.2d 311. See also Chicago & N. W. Ry. Co. v. Curl, 8 Cir., 1949, 174 F.2d 397, 502, and Texas & N.O.R. Co. v. Peel, Tex. Civ. App. 1953, 263 S.W.2d 582."

The question has been presented in State Courts frequently and the majority of those cases hold that there is error in failing to give charges of this nature.

In *Hall v. Chicago, etc. North Western Ry. Co.*, 125 N.E.2d 77, 80, Sup. Ct. Ill. 1955, the Court said:

"We are of the opinion that the incident of tax [illegible] is not a proper factor for a jury's consider-

> ation imparted either by oral argument or writt[en] instruction. It introduces an extraneous subject giving rise to conjecture and speculation."

In *Highshoe v. Kuskie*, 134 N.E.2d 555, 556 (Sup. Ct. Indiana, 1956), the Court said:

> "Inquiries at a trial into the incidents of taxation in damage suits of the character we have here would open up broad and new matters not pertinent to the issues involved. Such subject matter would involve intricate instructions on tax and non-tax liabilities with all the regulations pertinent thereto. No court could, with any certainty, properly instruct a jury without a tax expert at its side. In our judgment such matters are not a proper subject for instruction or argument of counsel."

In *Briggs v. Chicago, Gt. Western Ry. Co.*, 80 N.W.2d 625, 635 (Sup. Ct. Minn., 1957), the Court said:

> "The trial court properly denied defendant's request that the jury be instructed that any recovery by the plaintiff was exempt from Federal Income Tax."

There are many other State cases of which we cite the following:

> *Miles v. New York, Chicago & St. Louis Ry. Co.*, 135 N.E.2d 268, 269 (Sup. Ct. Ohio, 1956).
>
> *Brannon v. Illinois Bell Tel. Co.*, 129 N.E.2d 771, 773 (App. Ct. Ill., 1st Dist., 1955).
>
> *Mitchell v. Indiana*, 298 P.2d 1034 (Sup. Ct. Ariz., 1956).
>
> *Small v. T. RR. Co.*, 99 N.E.2d 501, 504 (Ct. of Appeals of Ohio, 1950).

Atherton v. MacDonald, Young & Nelson, Inc., 298 P.2d 700 (Dist. Court of Appeals of Cal., 1956)

In the last sentence of his brief petitioner states (p. 11):

> "If the charge ought to be given, as the Court of Appeals seems to feel, then it ought to be reversible error not to give it."

This is an incorrect statement regarding the decision of the Court of Appeals. Three judges held the refusal to charge Request 17 was correct and four judges held that the refusal to charge Request 18 was correct.

In the first sentence of the last paragraph of his brief (p. 11), petitioner states:

> "The requested charge in the case at bar can do no harm."

Although this Court may never have considered requests of this character, we submit that this is not a case presenting a situation where this Court should now pass upon the question, particularly as petitioner should explain how it could "do no harm."

Over four and one half years have passed since the accident and plaintiff has been seriously injured as appears from Judge Wentzel's charge here. From the testimony of plaintiff's physicians, as outlined by Judge Wentzel, the natural conclusion is that plaintiff is still disabled.

Under all the facts and circumstances presented in this case, we respectfully submit that it is not the case where this Court under Rule 19 should pass upon the question

involved as the great majority of Federal and State Courts have held those or similar requests to be improper, and particularly as petitioner has failed to show that it has been prejudiced or harmed by refusal to charge these requests (Judge Waterman's opinion, p. A154).

The Writ Should Be Denied

Respectfully submitted,

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